Central Manor Home for Adults Riverdale Manor *and* 1115 Nursing Home and Service Employees Union-Long Island, a Division of 1115 District Council, Hotel Employees and Restaurant Employees, AFL–CIO. Cases 29–CA–17767 and 29–CA–17789

March 22, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On September 8, 1995, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent, Central Manor Home for Adults, filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Central Manor Home for Adults, Far Rockaway, New York, and Riverdale Manor, Bronx, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

Sandra Rattner, Esq., for the General Counsel.
Stuart Bochner, Esq. (Horowitz & Pollack), of South Orange, New York, for the Respondents.
Stuart Weinberger, Esq. (Richard Greenspan, P.C.), of Ardsley, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by 1115 Nursing Home and Service Employees Union-Long Island, a Division of 1115 District Council, Hotel Employees and Restaurant Employees, AFL–CIO (the Union or Local 1115) in Cases 29–CA–17767 and 29–CA–17789. The Regional Director for Region 29 issued a consolidated complaint on December 30, 1993,[1] alleging in part that Central Manor Home for Adults (Respondent Central) and Riverdale Manor (Respondent Riverdale), collectively called Respondents, violated Section 8(a)(1) and (5) of the Act by, in substance, refusing to comply with the Union's requests for an audit of their books and records.

The trial with respect to the allegation raised by the complaint was held before me on June 28, 1995, in Brooklyn, New York. Letter briefs have been filed by the General Counsel and Respondents and have been carefully considered.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent Central and Respondent Riverdale have both been engaged in the operation of a nursing home providing long-term health care services to the public, located at 1509 Central Avenue, Far Rockaway, New York, and 6355 Broadway, Bronx, New York, respectively.

During the past year each of the Respondents, in the course and conduct of their respective business operations, derived gross revenues therefrom in excess of $100,000, and purchased and caused to be transported and delivered to their respective facilities, medical supplies, fuel oil, and other goods and materials valued in excess of $50,000, of which medical supplies, fuel oil, and other goods and materials valued in excess of $50,000 were transported and delivered to their respective facilities in interstate commerce either directly from firms located outside the State of New York, or directly from firms located within the State of New York, each of which firms purchased the medical supplies, fuel oil, and other goods and materials directly from firms located outside the State of New York.

Respondents admit and I find that each of them is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

At all times material, Respondents have been members of the Empire State Association of Adult Homes (the Association), which had existed for the purposes of representing its employer members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

The Association and the Union have been partners to a collective-bargaining agreement that by its terms ran from February 1, 1991, to January 31, 1995.

The agreement provided for a contract reopener for the fourth year of the contract to negotiate wages, hours, and general terms and conditions of employment. The agreement further provides that in the event that the parties fail to agree, the matter shall be submitted to arbitration and the award shall be final and binding.

The agreement also provides in paragraph 20(c) that ''the Union and the Funds shall have the right to examine the Employer's books and records once a year.''

At some point, undisclosed by the record, the Association ceased to exist as the collective-bargaining representative of its employees, but the Union continued to deal with the former constituent Association members, including Respondents, on an individual basis.

Although the Respondents negotiated with the Union pursuant to the reopener, these negotiations were not successful. Thus, the Union filed arbitrations against Respondents pursu-

[1] All dates here are in 1993, unless otherwise indicated.

ant to the terms of the agreement. A hearing was held on September 8, 1994, before Arbitrator Leon Reich concerning the issues of the reopener of the contract.

Arbitrator Reich issued identical decisions on December 29, 1994, finding, inter alia, that both Respondent Central and Respondent Riverdale were bound by the contract reopener clause, notwithstanding the change of status of the Association, that Respondents are obligated to pay certain specified increases in wages and contributions to certain of the Union's funds, and that the existing collective-bargaining agreement between the parties continues in full force and effect for the term provided there.

Meanwhile, on various dates between January 26 and September 9, 1993, the Union sent identical letters to 13 employer members of the Association, including letters sent on August 24 to Respondents. The letter requests that the Employers permit the Union to audit their books and records including quarterly WRS–2s, payroll journals, individual payroll records, and timecards.

The letters to Respondents indicate that the audit was ''for the purpose of, but not limited to, ascertaining whether you have been making the proper remittances of Dues and Initiation contributions.'' The letters state that the period of the audit is January 1, 1989, through December 31, 1992.

As noted the consolidated complaint issued on December 30, 1993, which alleged that Respondents, as well as 11 other employers, committed identical violations of Section 8(a)(1) and (5) of the Act.

On January 25, 1994, the Union requested withdrawal of the charges with respect to 10 of the employers included in the complaint, which the Regional Director approved by order dated May 11, 1994, in view of the fact that ''the parties have entered into an out-of-Board settlement remedying all of the allegations of said Consolidated Complaint'' with respect to these employers.

On February 3, 1995, the Union requested withdrawal of the charge in Case 29–CA–17812 against Queens Home for Adults, the last remaining Respondent in the original complaint, with the exception of the Respondents here, which was approved on February 8, 1995, by the Acting Regional Director, also because the parties ''entered into an out-of-Board settlement remedying all of the allegations of said Consolidated Complaint regarding Queens Home for Adults.''

As for Respondent Central and Respondent Riverdale, they have been bargaining with the Union over the terms of a new contract to replace the expired agreement between the parties.

With respect to the audit requests sent to Respondents, Harry Veras, the comptroller for the Union, testified that he sent the letters in order to determine whether these Respondents are making contributions to the Union's funds and withholding dues for the correct number of bargaining unit employees. The August 24 letters to these Respondents set up audit appointments for October 7 and 21 at the facilities of Respondent Central and Respondent Riverdale, respectively.

On these dates the auditors, sent by the Union to these facilities, were refused access by the respective employers, and were not provided the requested records. By letter dated October 18 and 21, respectively, Veras confirmed to the Respondents that they had not permitted the audits and threatened legal action to compel compliance with the Union's request. Neither Respondent responded to or protested the accuracy of these letters.

On June 2, 1994, Veras sent letters to both Respondents, asking that they send to the Union the payroll documents in light of the fact that they had previously refused access to their premises for the purpose of conducting the audits. Neither Respondent Central nor Respondent Riverdale has ever permitted the Union to audit its records, nor sent to the Union the requested payroll information.

Neither Respondent called any witnesses, nor presented any evidence. Respondents did issue several subpoenas, which I subsequently quashed, on relevance grounds, the particulars of which I shall discuss below in the analysis section of this decision.

III. ANALYSIS

It is well settled that an employer must provide the union that represents its employees with requested information that is necessary and relevant to the performance of its role as collective-bargaining representative. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967).

I credit the testimony of Veras that the Union requested the audit and payroll information so it could ascertain whether Respondents were making the proper amount of dues remittances and contractual payments to the Union's funds, and conclude that this information is clearly necessary and relevant to the Union in order to administer its collective-bargaining agreements with Respondents. *Audio Engineering,* 302 NLRB 942, 944 (1991). *A-Plus Roofing,* 295 NLRB 967, 971–973 (1989).

Respondents do not seriously dispute the above conclusion, but argue that the Union ''effectively lost, either through waiver (implicit or explicit) or through the requirement of equal treatment as between employers in a bargaining unit, the right to claim that the requested information was 'necessary' or 'required' by the Union.'' The basis for this contention is the fact that the Union requested withdrawal of the charges against all of the employers included in the consolidated complaint, except for the two Respondents here, and that the Union did not require all of these other employers to comply with the identical audit requests that it made to the Respondents. In that connection Respondents rely on the testimony of Veras who admitted that not all of the other employers complied with the audit request. Moreover the subpoenas that it issued, which I quashed directed to a union official and an official of the Association, according to Respondent would establish that the Union did not insist on audits from most if not all of the other employers, and that the reason it did not so insist was that these other employers agreed to bargain with the Union on a group basis and or agreed to a contract with the Union.

Respondents argue that the Union cannot claim that the information is necessary and relevant to its bargaining functions with Respondent, when it has not required similar compliance with requests made to the other employers in the Association.

I rejected that defense when I quashed Respondents' subpoenas, a ruling that I affirm, and shall not reconsider despite Respondents' request that I do so. In my view why the Union chose to withdraw its charges against the other employers in the Association, or whether or not it insisted that these employers comply with the same information request

that it made of the Respondents, is not relevant to the issue of Respondents' obligation to comply with a request for information. I have credited Veras that at least one reason for the request for the audit was to administer its collective-bargaining agreement with these Respondents and that is sufficient to establish the necessary relevance that requires Respondents to comply with the requests.

The contention of Respondents that the Union's true purpose in seeking the information was to force contract concessions or multiemployer bargaining does not negate Respondents' duty to furnish the information requested. *Electrical Workers IBEW Local 292 (Sound Employers Assn.)*, 317 NLRB 275, 275 (1995), ''it is well settled that where a party requests information that is relevant to that party's collective bargaining needs, it is irrelevant that there may also be other reasons for the request or that the information may be put to other uses.'' Id., *Associated General Contractors of California*, 242 NLRB 891, 894 (1979); *Utica Observer-Dispatch, Inc. v. NLRB*, 229 F.2d 575, 577 (2d Cir. 1956). See also *A-Plus Roofing*, supra at 977.

With respect to Respondents' argument that the Union waived its rights to the information by not compelling the other employers to supply similar information, ''national labor policy casts a wary eye on claims of waiver of statutorily protected rights. Therefore, the statutory right to discovery can be waived only if the Union's waiver is clear and unmistakable.'' *Gannett Rochester Newspapers v. NLRB*, 988 F.2d 198, 203 (D.C. Cir. 1993), citing *NLRB v. New York Telephone Co.*, 930 F.2d 1009, 1111 (2d Cir. 1991); and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Clearly the Union's conduct here does not come close to amounting to a ''clear and unmistakable'' waiver of its statutory rights to the information from Respondents, and I reject Respondents' contention in that regard.

Accordingly, I conclude that Respondents have violated Section 8(a)(1) and (5) of the Act by refusing to supply relevant and necessary information to the Union.[2]

The complaint also alleges and the General Counsel contends, as an alternative theory, that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally modifying the contract without the Union's consent. *Scott Lee Guttering Co.*, 295 NLRB 497, 510–511 (1989).

In that connection the General Counsel relies on the contractual provision that allows the Union the right to examine that Employer's books and records to determine whether the Employer has complied with contribution requirements of the agreement.

Respondents acknowledge this provision, but point out that the clause restricts the review period to 1 year only, and the Union requested records for a period of 2 years. Respondents would undoubtedly have had a valid defense to this allegation, had they insisted on the Union's compliance with the contract and offered the Union their records for the contractually prescribed 1-year period. However, they did not do so. Nor did either Respondent ever raise the issue of the extent of the audit request as a defense to the Union's demand and, as noted, never offered to permit an audit for a 1-year period. In these circumstances, I conclude that Respondents cannot rely on the Union's failure to request records for a 1-year period, inasmuch as the Respondents' failure to permit the audit was clearly not based on the fact that the request was for records for a period of 2 years. I therefore find that Respondents have violated Section 8(a)(1) and (5) of the Act by failing to comply with the contractual requirement for an examination of their books, without the Union's consent.

[2] I also reject Respondents' argument that the questions of why the Regional Director approved the withdrawal requests of the Union vis-a-vis the other employers, or whether or not the Union may have misled the Regional Director by misrepresenting that the other employers had complied with the audit requests, has any relevance to Respondents' obligation to supply information to the Union.

CONCLUSIONS OF LAW

1. Respondent Central and Respondent Riverdale are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to permit the Union to audit their books and records and to supply the Union with requested information necessary for, and relevant to, the Union's ability to administer its collective-bargaining agreement and to the Union's performance of its function as collective-bargaining representative, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By failing to comply with their contractual obligation to allow the Union to examine their books and records, Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. The unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend that Respondents permit the Union to audit their books and records, and to supply the information requested in the Union's letters of August 24 and October 18 and 21, 1993, and June 2, 1994.

Based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

A. The Respondent, Central Manor Home for Adults, Far Rockaway, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with 1115 Nursing Home and Service Employees Union-Long Island, a Division of 1115 District Council, Hotel Employees and Restaurant Employees, AFL–CIO as the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit, and by failing and refusing to permit the Union to audit

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

its books and records, failing and refusing to furnish the Union with information necessary for, and relevant to, the Union's ability to administer the collective-bargaining agreement properly and that is relevant and necessary to its function as the representative.

(b) Failing and refusing to comply with its contractual obligation to permit the Union to examine its books and records.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly permit the Union access to its premises in order to audit and examine its books and records, and supply the Union the information requested in its letters of August 24 and October 18, 1993, and June 2, 1994.

(b) Post at its Far Rockaway, New York facility copies of the attached notice marked ''Appendix A.''[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The Respondent, Riverdale Manor, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with 1115 Nursing Home and Service Employees Union-Long Island, a Division of 1115 District Council, Hotel Employees and Restaurant Employees, AFL–CIO as the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit and by failing and refusing to permit the Union to audit its books and records, failing and refusing to furnish the Union with information necessary for, and relevant to, the Union's ability to administer the collective-bargaining agreement properly and that is relevant and necessary to its function as the representative.

(b) Failing and refusing to comply with its contractual obligation to permit the Union to examine its books and records.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly permit the Union access to its premises in order to audit and examine its books and records, and supply the Union the information requested in its letters of August 24 and October 21, 1993, and June 2, 1994.

(b) Post at its Bronx, New York facility, copies of the attached notice marked ''Appendix B.''[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with 1115 Nursing Home and Service Employees Union-Long Island, a Division of 1115 District Council, Hotel Employees and Restaurant Employees, AFL–CIO as the exclusive collective-bargaining representative of our employees in an appropriate bargaining unit, by failing and refusing to permit the Union to audit our books and records, or failing and refusing to furnish the Union with information necessary for, and relevant to, the Union's ability to administer the collective-bargaining agreement properly and that is relevant to and necessary to its function as the representative.

WE WILL NOT fail and refuse to comply with our contractual obligation to permit the Union to examine our books and records.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL promptly permit the Union access to our premises in order to audit and examine our books and records, and supply the Union the information requested in its letters to us of August 24 and October 18, 1993, and June 2, 1994.

CENTRAL MANOR HOME FOR ADULTS

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
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The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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WE WILL NOT refuse to bargain collectively with 1115 Nursing Home and Service Employees Union-Long Island, a Division of 1115 District Council, Hotel Employees and Restaurant Employees, AFL–CIO as the exclusive collective-bargaining representative of our employees in an appropriate bargaining unit, by failing and refusing to permit the Union to audit our books and records, or failing and refusing to furnish the Union with information necessary for, and relevant to, the Union's ability to administer the collective bargaining agreement properly and that is relevant to and necessary to its function as the representative.

WE WILL NOT fail and refuse to comply with our contractual obligation to permit the Union to examine books and records.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly permit the Union access to our premises in order to audit and examine our books and records, and supply the Union the information requested in its letters to us of August 24 and October 21, 1993, and June 2, 1994.

RIVERDALE MANOR